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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
U. S. OIL & REFINING COMPANY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 83-6

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER (REVISED)

This matter, the appeal from Department of Ecology Order DE 82-548, came before the Pollution Control Hearings Board, David Akana (presiding), and Lawrence J. Faulk at a formal hearing in Lacey, on April 13-14, 1983.

Appellant was represented by its attorney, Michael R. Thorp; respondent was represented by Charles W. Lean, Assistant Attorney General. Court reporter Bibi Carter recorded the proceedings.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, including the

1 petition for reconsideration and responses thereto, the Board makes
2 these revised

3 FINDINGS OF FACT

4 I

5 U. S. Oil and Refining Company is an independent processor of oil
6 products. Appellant conducts its business at 3001 Marshall Avenue in
7 Tacoma, Washington.

8 II

9 Respondent Department of Ecology is a state agency charged with
10 the administration and enforcement of chapter 90.48 RCW.

11 III

12 The U. S. Oil facility is located in the Tacoma Industrial area
13 between the Blair Waterway and the Puyallup River. U. S. Oil has a
14 number of petroleum storage tanks which it maintains on its property.
15 Each tank is diked to contain spills.

16 IV

17 U. S. Oil drains "draw waters" which contain oil (TR 1-51, 52, 67,
18 TR 2-64, 69) and other organic compounds from the storage tanks in its
19 refinery and dumps it on the ground within the spill containment
20 dikes. The area inside the dike is unlined and in some instances lies
21 two feet above the water table. The "draw waters" which are drained
22 eventually disappear into the ground or flow to the "back pond(s),"
23 through unlined ditches for the most part. That portion of the "drain
24 waters" reaching the "back ponds" is ultimately treated in U. S. Oil's
25 water treatment facility.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER (REVISED) - 2
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1 V

2 There are three so-called back ponds which collect the flow of the
3 draw waters. The oil is skimmed off the back pond periodically and
4 pumped into tank trucks. Water in the back ponds is pumped to the
5 U.S. Oil treatment facility.

6 VI

7 During a two-year period from mid-1979 to mid-1981, six spills of
8 gasoline, gasoline additive or crude oil occurred at the appellant's
9 refinery. While these spills are not directly related to this case,
10 they did lead to the respondent's concern about the quality of the
11 ground water at the refinery. As a result of this concern, a series
12 of discussions were held between U. S. Oil and Refining Co. and the
13 Department of Ecology. In addition, appellant took remedial measures
14 to control and reduce the risk of future spills such as making
15 improvements in the methods used to transfer oil and by improving the
16 facilities for storing and unloading oil.

17 VII

18 On January 26, 1982, respondent visited appellant's plant and
19 communicated its concern about ground water contamination because
20 there was a strong possibility that oil in the "draw waters" had
21 reached state waters. A draft compliance order was discussed. During
22 the next several months a number of discussions took place between
23 appellant and respondent. On April 14, 1982, WDOE sent additional
24 information to U. S. Oil.

VIII

On June 4, 1982, another meeting was held between WDOE and U. S. Oil. At that time, WDOE agreed that a number of actions taken by U. S. Oil satisfied their concerns as set forth in the original draft compliance order. Some areas of disagreement remained however. U. S. Oil took the position that a ground water testing and monitoring study should first be completed to evaluate the presence and extent, if any, of ground water contamination.

On September 28, 1982, WDOE approved U. S. Oil's suggestions for programs for product line operations and product loading area improvements. WDOE also stated that the ground water monitoring program was generally acceptable and requested that several additional items be included in that program.

IX

On October 20, 1982, U. S. Oil transmitted the test procedures for the ground water monitoring program and requested WDOE's approval. On October 26, 1982, WDOE concurred with the test procedures. WDOE went on to request that samples be taken of four additional parameters and that the program should get under way as soon as practical.

X

On December 18, 1982, wells for the ground water monitoring program were drilled by U. S. Oil's consultant. One well was abandoned at 10 feet due to gasoline vapor emissions from the well. The first samples were taken by U. S. Oil's consultant and WDOE on December 30, 1982.

XI

On December 10, 1982, WDOE issued compliance order No. 82-548 to U. S. Oil and Refining Co. The order directed U. S. Oil to submit to the department of Ecology for review and approval within sixty days from receipt of the order, plans and specifications for the following actions: (a) collecting and treatment of "draw waters" in the existing wastewater treatment system; (b) modification and replacement of the "back pond" to provide an impermeable seal to prevent pond water from seeping into the ground water and; (c) treatment of the collected back pond water in the existing treatment system. These actions were to be completed within 180 days after the department's approval of the plans and specifications.

From this order appellant filed an appeal on January 7, 1983.

XII

The data collected by U. S. Oil's consultant indicates that the near surface soils beneath the refinery consist of 5 to 10 feet of fine to medium sand overlying silt. Water level measurements in wells screened in this sand unit indicate that the water table lies at a depth of between approximately 2 and 7 feet and that the general direction of ground water flow is to the northwest, toward Commencement Bay.

XIII

Appellant contends that: (1) the requirement to collect and treat "draw waters" is unjust and unlawful in that there is no evidence that appellant's procedure for handling "draw waters" violates the

1 Washington Clean Water Act, RCW Chapter 90.48, or that such "draw
2 waters" in any way pollute the waters of this state; (2) since the
3 WDOE order was issued without any evidence that unlawful contamination
4 is occurring and before appellant's testing results were available, the
5 order is in excess of WDOE's statutory authority; and (3) WDOE's
6 finding that "immediate action is necessary" is clearly erroneous.

7 XIV

8 WDOE contends it has the authority to issue an order under RCW
9 90.48.120(1) or (2) whenever it is deemed necessary to prevent
10 pollution of ground waters. Respondent indicated the instant matter
11 was not an emergency.

12 XV

13 Any Conclusion of Law which should be deemed a Finding of Fact is
14 hereby adopted as such.

15 From these Findings the Board comes to these

16 CONCLUSIONS OF LAW

17 I

18 RCW 90.48.080 provides:

19 It shall be unlawful for any person to throw, drain,
20 run, or otherwise discharge into any of the waters of
21 this state, or to cause, permit or suffer to be
22 thrown, run, drained, allowed to seep or otherwise
23 discharged into such waters any organic or inorganic
24 matter that shall cause or tend to cause pollution of
25 such waters according to the determination of the
26 commission, as provided for in this chapter.

24 "Draw waters," because they contain oil and other organic
25 compounds, can cause "pollution" of the waters of the state. RCW
26 90.48.020. Ground waters located under appellant's site are

1 underground waters which are included within the phrase "waters of the
2 state." RCW 90.48.020; RCW 90.48.315(10).

3 II

4 RCW 90.48.320 provides in relevant part:

5 It shall be unlawful, except under the circumstances
6 hereafter described in this section, for oil to enter
7 the waters of the state from any ship or any fixed or
8 mobile facility or installation located offshore or
9 onshore whether publicly or privately operated,
regardless of the cause of the entry or fault of the
person having control over the oil, or regardless of
whether it be the result of intentional or negligent
conduct, accident or other cause....

10 III

11 RCW 90.48.120 provides:

12 (1) Whenever, in the opinion of the department, any
13 person shall violate or is about to violate the
14 provisions of this chapter, or fails to control the
15 polluting content of waste discharged or to be
16 discharged into any waters of the state, the
17 department shall notify such person of its
18 determination by registered mail. Such determination
19 shall not constitute an order or directive under RCW
20 90.48.135. Within thirty days from the receipt of
notice of such determination, such person shall file
with the department a full report stating what steps
have been and are being taken to control such waste or
pollution or to otherwise comply with the
determination of the department. Whereupon the
department shall issue such order or directive as it
deems appropriate under the circumstances, and shall
notify such person thereof by registered mail.

21 (2) Whenever the department deems immediate action is
22 necessary to accomplish the purposes of chapter 90.48
23 RCW, it may issue such order or directive, as
24 appropriate under the circumstances, without first
25 issuing a notice or determination pursuant to
subsection (1) of this section. An order or directive
issued pursuant to this subsection shall be served by
registered mail or personally upon any person to whom
it is directed. (Emphasis added.)

1 Under the foregoing provision it must be shown that appellant is
2 violating or about to violate the provisions of chapter 90.48 RCW, or
3 has failed to control pollutants discharged or about to be discharged
4 into state waters.

5 IV

6 The purpose of subsection (1) is to give advance notice to persons
7 that the department believes have violated or are about to violate the
8 statute (Ch 90.48 RCW). A person receiving such notice has an
9 opportunity to respond or to take steps to control the pollutants
10 before WDOE issues an order.

11 Subsection (2), on the other hand, allows the WDOE to dispose with
12 subsection (1) notice whenever the WDOE deems immediate action is
13 necessary. The use of subsection (1) or (2) is left to the discretion
14 of the department. An emergency situation or condition is not
15 required. (See RCW 90.48.240.)

16 WDOE and U. S. Oil had been negotiating for an extended period of
17 time on how best to solve the problem. The results achieved were not
18 satisfactory to WDOE. It was, therefore, reasonable for WDOE to issue
19 the subject order.

20 V

21 Appellant is subject to the provisions of both RCW 90.48.080 and
22 RCW 90.48.320. Appellant stipulated that a portion of the material
23 that is applied to the ground, i.e., draw waters, will reach ground
24 waters. (TR 2-29). The Board believes that it was shown by a
25 preponderance of the evidence that "draw waters" which contain oil

1 have entered or are "about" to enter the waters of the state from
2 appellant's facility. (Finding of Fact IV.)

3 VI

4 Appellants contention that WDOE does not have the authority to
5 issue the order in question is without merit. The respondent clearly
6 has the authority to issue an order when it believes that the ground
7 waters of the state are "about" to be polluted. (RCW 90.48.120)

8 VII

9 A system for preventing the "draw waters" from potentially
10 contaminating the ground waters of the state should be installed. The
11 Board was not persuaded that an alleged economic hardship exists with
12 appellant because there was no financial evidence offered that proved
13 this point. A prioritized system and schedule should be developed
14 cooperately between the appellant and the respondent to address the
15 "draw water" question. This approach would first correct those areas
16 considered by respondent to pose the greatest problem and then proceed
17 to lower priority areas. In this manner all problem areas could be
18 corrected in an appropriate sequence.

19 VIII

20 The "back pond(s)" are being replaced. Therefore respondent should
21 adopt a compliance schedule that allows the construction to take place
22 during the appropriate season of the year.

23 IX

24 Appellant did not show that the time periods set forth in the
25 compliance schedule were unreasonable.

1 X

2 Any Finding of Fact which should be deemed a Conclusion of Law is
3 hereby adopted as such.

4 From these conclusions the Board enters this


5 ORDER

6 Respondent order No. DE 82-548 is upheld and remanded to the
7 department for a revised compliance schedule based on Conclusions of
8 Law number VII and VIII.

9 DONE this 4th day of August, 1983.

10 POLLUTION CONTROL HEARINGS BOARD

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12
13 LAWRENCE J. PAULE, Member

14 
15 DAVID AKANA, Lawyer Member
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